

Case Summary

Timothy Frankosky appeals his conviction and sentence for nonsupport of a dependant child, a Class C felony, after entering a plea agreement with the State under which he was sentenced to six years, with five years executed and one year suspended to probation. Concluding that Frankosky waived the argument that the terms of his plea agreement were violated, and further concluding that he was properly convicted and that the sentencing court properly determined and imposed an appropriate sentence, we affirm.

Issues

Frankosky raises four issues for review, which we consolidate, reorder, and restate as follows:

1. Whether the State violated the terms of Frankosky's plea agreement during his sentencing hearing;
2. Whether Frankosky was incorrectly convicted for nonsupport of a child dependent as a Class C felony rather than a Class D felony; and
3. Whether Frankosky's sentence was proper and appropriate.

Facts and Procedural History

Frankosky's paternity of the dependant children in this case was established in 1998, when he was also ordered to make support payments. Between 1998 and 2005, Frankosky paid only \$2,599.72, accruing an arrearage of \$26,623.66.¹ Frankosky admits to owing an additional \$16,698.00, which the trial court imposed upon him as an arrearage at the time his paternity was established. Thus, the total arrearage due at the time charges were brought was

\$43,321.66. On June 1, 2005, Frankosky was charged with nonsupport of a dependant child as a Class C felony, and on January 13, 2006, he entered into a plea agreement with the State. The agreement's terms included that Frankosky would plead guilty to nonsupport of a dependant child as a Class C felony, and that both sides could argue sentencing aggravators and mitigators, "but the State shall not recommend an executed sentence or any particular length of sentence." Appellant's Appendix at 15. Sentencing was left to the discretion of the sentencing court.

On February 1, 2006, the sentencing court accepted the plea agreement and guilty plea. During the sentencing hearing on March 8, 2006, the State made the following argument:

I think there are some aggravators to consider here. There is some criminal history, the time he has done in prison on the sexual assault. . . . But I think what probation is recommending is a reasonable sentence in this situation and I would urge the Court to follow the recommendation. Your honor, I don't really make a recommendation as to what to do. I just—that was in our plea agreement. I apologize.

Transcript at 39. After considering the pre-sentencing report and identifying mitigating and aggravating circumstances, the sentencing court sentenced Frankosky to six years with the Indiana Department of Correction, with one year suspended to probation. Frankosky now appeals.

Discussion and Decision

I. Violation of Frankosky's Plea Agreement

¹ These payment and arrearage amounts cover the timeframe indicated in the probable cause affidavit, starting October 30, 1998, and ending May 24, 2005.

It is well settled that plea agreements are contractual in nature, and are binding upon the parties as well as the sentencing court, when accepted. Cox v. State, 850 N.E.2d 485, 489 (Ind. Ct. App. 2006). Frankosky contends the State’s suggestion, which the State immediately retracted in light of the plea agreement, that the sentencing court follow the sentencing recommendation in the pre-sentencing report sufficiently violated the terms of his plea agreement to mandate setting aside his sentence. Frankosky likens the situation to “the old statement ‘please ignore the pink elephant in the back of the room.’” Brief of Appellant at 8. Be that as it may, Frankosky failed to object to the State’s suggestion and immediate recantation during the sentencing hearing. Therefore, Frankosky has waived this issue on appeal. See Stott v. State, 822 N.E.2d 176, 179 (Ind. Ct. App. 2005), trans. denied (“Generally, a contemporaneous objection is required to preserve an issue for appeal.”). Even had the issue been preserved for appeal, the State’s comment, although inappropriate, was remedied, and would not require setting aside his sentence. This is especially true because, prior to Frankosky’s sentencing hearing, the sentencing court ordered and reviewed the pre-sentence report, which included the recommended sentence later adopted.

II. Frankosky’s Conviction

The plea agreement signed by Frankosky expresses his agreement to “plead guilty to Count I, Nonsupport of a Dependent Child, a Class C felony.” Appellant’s App. at 15. Nevertheless, Frankosky now contends he was “wrongly convicted and sentenced for criminal nonsupport . . . as a Class C felony.” Appellant’s Br. at 16. We do not reach Frankosky’s assertion to the extent that it calls into question his conviction. As our supreme

court clarified in Collins v. State, 817 N.E.2d 230, 231 (Ind. 2004):

A person who pleads guilty is not permitted to challenge the propriety of that conviction on direct appeal. However, a person who pleads guilty is entitled to contest on direct appeal the merits of a trial court's sentencing decision where the trial court has exercised sentencing discretion, i.e., where the sentence is not fixed by the plea agreement.

Even were we to reach the issue on its merits, Frankosky's argument would fail. Indiana Code section 35-46-1-5(a) delineates that a person "who knowingly or intentionally fails to provide support to the person's dependent child commits nonsupport of a child, . . . a Class C felony if the total amount of unpaid support that is due and owing for one (1) or more children is at least fifteen thousand dollars (\$15,000)." During the timeframe of the charges against Frankosky, the total amount of unpaid support due and owing was at least \$26,623.66, not including the \$16,698.00 for which he was previously found to be in arrears. Therefore, his guilty plea and conviction for a Class C felony were in line with the statute.

III. Frankosky's Sentence

Frankosky challenges whether his sentence was proper and appropriate. Specifically, he argues that the sentencing court failed to properly consider mitigating factors, and questions whether aggravating factors found by the trial court outweighed the single mitigating factor of his guilty plea. It is well settled that sentencing decisions are within the sentencing court's discretion and will be reversed only for an abuse of discretion. White v. State, 847 N.E.2d 1043, 1045 (Ind. Ct. App. 2006). Here, the charge against Frankosky for nonsupport of a dependant child was based on a timeframe between 1998 and 2005. He entered a guilty plea in February of 2006, and was sentenced in March of 2006. Therefore,

before considering the propriety of the sentencing court's decision, we must address which sentencing statute is applicable in this case.

In 2004, the Supreme Court in Blakely v. Washington, 542 U.S. 296 (2004), applied its ruling in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), to the effect that any fact used to increase the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt, unless it was the fact of a prior conviction. The Indiana Supreme Court in Smylie v. State, 823 N.E.2d 679, 684-85 (Ind. 2005), cert. denied, 126 S. Ct. 545 (2005), concluded that Indiana's sentencing regime, which provided presumptive sentences to be increased based upon aggravators, violated the Supreme Court's rulings.

Our legislature responded to Blakely and Smylie by amending our sentencing statutes to replace "presumptive" sentences with "advisory" sentences, effective April 25, 2005. Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied. Under the new advisory sentencing scheme, "a court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution 'regardless of the presence or absence of aggravating circumstances or mitigating circumstances.'" Id. (quoting Ind. Code § 35-38-1-7.1(d)). Thus, while under the previous presumptive sentencing scheme, a sentence must be supported by Blakely-appropriate aggravators and mitigators, under the new advisory sentencing scheme, a trial court may impose any sentence within the proper statutory range regardless of the presence or absence of aggravators or mitigators.

There is a split on this court as to whether the advisory sentencing scheme should be

applied retroactively. Compare Settle v. State, 709 N.E.2d 34, 35 (Ind. Ct. App. 1999) (sentencing statute in effect at the time of the offense, rather than at the time of conviction or sentencing, controls) and Weaver, 845 N.E.2d at 1070 (concluding that application of advisory sentencing statute violates the prohibition against *ex post facto* laws if defendant was convicted before effective date of the advisory sentencing statutes but was sentenced after) with Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that change from presumptive sentences to advisory sentences is procedural rather than substantive and therefore application of advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though offense was committed before). Our supreme court has not yet had the opportunity to resolve this issue.

However, in the recent case of Walsman v. State, No. 69A04-0512-CR-701 (Ind. Ct. App. October 23, 2006), a panel of this court addressed whether retroactive application of the advisory sentencing scheme would violate the prohibition against *ex post facto* laws. In that case, Walsman was convicted of robbery as a Class B felony, for acts committed before amendment of Indiana's sentencing statutes, and was sentenced after the effective date of the amendments. He argued that because application of the advisory sentencing scheme permitted a maximum sentence beyond the presumptive term of ten years, in place when he committed the crime, it violated the prohibition against *ex post facto* laws. We agreed.

As we noted in Walsman, under Blakely the "maximum" sentence was that permitted by statute, which could then be increased beyond the maximum due to aggravating factors. Prior to amendment of Indiana's sentencing scheme, the "presumptive" term was the

maximum sentence that could be imposed for a crime, which could be enhanced due to aggravating factors. The advisory sentencing scheme replaces presumptive terms with advisory terms, and statutorily permits a sentence within a range of years including a maximum term greater than the previous presumptive, or maximum, term. In other words, what was once the statutorily prescribed maximum term is now an advised midpoint within a statutorily prescribed range.

In Walsman, application of the amended sentencing statutes violated the prohibition against *ex post facto* laws because it increased the maximum penalty the sentencing court could impose without submitting additional facts to a jury. Importantly, when considering Walsman's sentence in light of the previous sentencing scheme, no valid aggravators existed to warrant enhancement of the presumptive sentence. As Judge Sharpnack's concurrence in Walsman explained, "Where there are aggravators that would support an enhanced sentence under the presumptive sentence regime and would not implicate Blakely concerns, application of the advisory sentence regime would not expose the defendant to a possibly more severe sentence." Id.

In the present case, Frankosky's plea agreement included the following stipulations:

2. That the Court may impose whatever sentence it deems appropriate. The defendant waives notice of aggravating circumstances and factors for sentencing purposes and waives his right to a jury to decide aggravating circumstances and factors. The defendant consents to judicial fact-finding regarding aggravating and mitigating factors to determine the appropriate sentence.

Appellant's App. at 15. As a result, by accepting the plea agreement, Frankosky waived any argument that the sentencing court considered aggravating factors raising Blakely concerns.

Strong v. State, 820 N.E.2d 688, 690 (Ind. Ct. App. 2005), trans. denied. However, he did not forfeit the right to contest whether the aggravators relied upon by the sentencing court were proper, or the weight given to each. Ultimately, then, regardless of which sentencing scheme is employed, the same analysis is required to determine whether Frankosky's sentence was proper. The outcome is the same under both.

A. Presumptive Sentencing Scheme

Under the old sentencing scheme, Frankosky was subject to imprisonment “for a fixed term of four (4) years, with not more than four (4) years added for aggravating circumstances or not more than two (2) years subtracted for mitigating circumstances.” Ind. Code § 35-50-2-6(a). Modification of the presumptive sentence based upon aggravating or mitigating circumstances requires the sentencing court to: (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate its evaluation and balancing of the circumstances. White, 847 N.E.2d at 1045.

Here, the trial court identified Frankosky's criminal history, minimal involvement with his children, and his minimal payment of child support as aggravating factors. It also recognized Frankosky's guilty plea as the sole mitigating factor. The aggravators were found to outweigh the mitigator, resulting in an enhanced sentence of six years. Frankosky concedes that the sentencing court correctly considered his guilty plea as a mitigating factor, and does not argue it should have been given more weight. Rather, he asserts the trial court should have considered the nonviolent nature of the crime and the position of responsibility

he was given while incarcerated to be additional mitigating factors. He also calls into question the significance and weight the trial court gave to his criminal history, his minimal involvement with his children, and the minimal amount he paid in child support.

When a defendant offers evidence of mitigators, the trial court has the discretion to determine whether the factors are mitigating, and is not required to explain why it does not find the proffered factors to be mitigating. Stout v. State, 834 N.E.2d 707, 710 (Ind. Ct. App. 2005), trans. denied. The trial court is not required to give the same weight as the defendant does to mitigating evidence. Id. at 712. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Matshazi v. State, 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004), trans. denied. Here, Frankosky makes no argument as to why the nonviolent nature of his failure to pay child support is significant. Likewise, he fails to establish the significance of evidence indicating he was given a position of trust while incarcerated. Without such a showing, we cannot say the trial court erred by not finding these to be mitigating factors.

As for the three aggravating circumstances found by the trial court, we reiterate that under Frankosky's plea agreement, he has waived any argument arising from Blakely. We look to the facts and circumstances of the sentencing court's decision for a manifest abuse of its discretion. White, 847 N.E.2d at 1045. The assessment of the proper weight of mitigating and aggravating circumstances, and the appropriateness of the sentence as a whole, is entitled to great deference. Id. Even a single aggravating circumstance may support the imposition

of an enhanced sentence. Id.

We first consider the sentencing court's finding of Frankosky's criminal history as an aggravating factor. Frankosky argues that his one prior felony conviction for sexual assault in 1992 should not have been given significant weight in enhancing his current sentence. "The significance of a criminal history varies based on the gravity, nature and number of prior offenses as they relate to the current offense." Bryant v. State, 841 N.E.2d 1154, 1156-57 (Ind. 2006) (internal quotations omitted). The State concedes that Frankosky's prior conviction "bears no obvious relation to his current conviction." Brief of Appellee at 6. The State nonetheless contends that the gravity of his crime, for which he served a ten-year sentence, suggests a similarity with a Class B felony in Indiana.² Although that may be accurate, Frankosky's present conviction is for a Class C felony. Consequently, because the gravity and nature of Frankosky's single prior conviction does not rise to the level of a significant aggravator for his current sentence, it should not have been relied upon as a basis for enhancement.

Even so, the sentencing court's reliance on Frankosky's criminal history was harmless error in light of its identification of two other aggravating factors supporting enhancement of his sentence. Frankosky's minimal involvement with his children and his minimal payment of child support go to the nature and circumstances of his crime. See Waldon v. State, 829 N.E.2d 168, 183 (Ind. Ct. App. 2005), trans. denied (trial court properly relied upon nature and circumstances of crime as an aggravating factor). Although Frankosky's lack of

² The pre-sentencing report indicates Frankosky's conviction for sexual assault was in New Jersey.

involvement with his children is more similar to an “observation” of the sentencing court rather than an aggravating factor found by a jury, Morgan v. State, 829 N.E.2d 12, 17 (Ind. 2005), the distinction is irrelevant here because Frankosky waived his rights under Blakely. Moreover, evidence reviewed by the sentencing court in the form of letters from the children’s mother and grandfather support this finding.

With regard to the minimal amount of Frankosky’s payments, he argues that the trial court erred by relying on this fact because the amount of his arrearage “is an element of a Class C felony offense and already considered in the presumptive or advisory sentence.” Br. of Appellant at 14. We do not disagree that “a material element of a crime may not be used as an aggravating factor,” Waldon, 829 N.E.2d at 184, or that “the total amount of unpaid support that is due and owing” is an element of Indiana Code section 35-46-1-5(a). However, it is clear from the transcript as well as the order that the sentencing court did not take into account the amount due and owing for purposes of enhancing Frankosky’s sentence, but looked instead to the amount he actually paid over a seven-and-a-half year period. Although the two amounts are related, the amount paid toward the child support obligation is not a material element of the crime.

Therefore, although the sentencing court should not have relied upon Frankosky’s criminal history to enhance his sentence, its identification of other aggravating factors supports imposition of a sentence beyond the presumptive term.

B. Advisory Sentencing Scheme

Application of Indiana’s sentencing statute as amended results in the imposition of a

sentence “for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years.” Ind. Code § 35-50-2-6(a). An advisory sentence is “a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence.” Ind. Code § 35-50-2-1.3(a). Moreover, “regardless of the presence or absence of aggravating circumstances or mitigating circumstances,” a trial court may impose any sentence that is authorized by statute, and permissible under the Constitution of the State of Indiana. Ind. Code § 35-38-1-7.1(d). Under this sentencing scheme, regardless of aggravators or mitigators, the trial court could not abuse its discretion by imposing upon Frankosky a six-year term within the range authorized by statute for his offense.

C. Appropriateness of Frankosky’s Sentence

Additionally, Frankosky asks us to exercise our authority to review and revise his sentence, which we may do if, after due consideration of the sentencing court’s decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). We exercise great restraint in doing so, recognizing the special expertise of the trial bench in making sentencing decisions. Scott v. State, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), trans. denied.

A statutorily prescribed sentence is the “starting point the Legislature has selected as an appropriate sentence for the crime committed.” Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). The nature of Frankosky’s crime is that he has failed to satisfy the specific obligation of court-ordered support, by providing less than ten percent of what was required

of him to benefit his children. His character is reflected by his unwillingness to live up to the responsibilities of fatherhood. As such, we cannot say Frankosky's sentence is inappropriate in light of his offense or his character.

Conclusion

Frankosky failed to preserve the issue of whether the terms of his plea agreement were violated because he did not object during the sentencing hearing when the State made an inappropriate comment, which it immediately recanted. Furthermore, Frankosky may not directly appeal his conviction because he entered into a guilty plea, and even were his conviction considered on its merits, we would conclude it corresponds with the statute. In addition, under the presumptive sentencing scheme, the sentencing court's improper reliance on Frankosky's single prior conviction as an aggravator was harmless error in light of two other identified aggravators supporting imposition of an enhanced sentence. Likewise, under the advisory sentencing scheme, the sentencing court imposed a sentence within the prescribed range regardless of aggravators or mitigators. Lastly, this sentence was not inappropriate given Frankosky's character and the nature of his offense. Therefore, we affirm Frankosky's sentence.

Affirmed.

BARNES, J. concurs.

SULLIVAN, J., concurs in result.